IN THE SUPREME COURT OF THE UNITED STAES

OCTOBER TERM, 1982

NO. 82-6663



WILLIAM MIDDLETON, JR.,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF FLORIDA

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N. JOSEPH DURANT, JR.
GELBER, GLASS, DURANT
& CANAL, P.A.
1250 N.W. 7th Street
Suites 203-205
Miami, Florida 33125
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## QUESTIONS PRESENTED FOR REVIEW

I

WHETHER A STATE APPELLATE COURT, BY HOLDING THAT THE SENTENCING COURT'S CONSIDERATION OF AN IMPROPER NON-APPLICABLE AGGRAVATING FACTOR COULD NOT HAVE AFFECTED THE OVERALL SENTENCING WEIGHING PROCESS, VIOLATES THE EIGHTH AMENDMENT REQUIREMENT OF RATIONAL APPELLATE REVIEW OF CAPITAL SENTENCING DECISIONS.



GELBER GLASS DURANT CANAL & DARBY, P.A. • ATTORNEYS AT LAW • SUITES 203-205 • 1250 NORTHWEST 7th STREET • MIAMI, FLORIDA 33125 • (305) 326-0090

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WILLIAM MIDDLETON, JR.,

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Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

---

Petitioner, WILLIAM MIDDLETON, JR., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Florida in this cause, rendered on December 22, 1982.

## OPINION BELOW

The opinion of the Supreme Court of Florida is not yet reported. The full opinion is Appendix A to this petition.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), to review the judgment and opinion of the Supreme Court of Florida, issued on December 22, 1982 and rendered upon the denial of a timely motion for rehearing on March 2, 1983.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMEND. VIII, U.S. CONST.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMEND XIV, § 1, U.S. CONST.

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sub Section 921.141, Fla. Stat. (1973)

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. - Northwithstanding the recommendation of a majority of the jury,the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection [5], and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection [6], to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections [5] and [6] and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentnece, the court shall impose sentence of life imprisonment in accordance with sub section 775.082.

* * *

(5) AGGRAVATING CIRCUMSTANCES. - Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.



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(6) MITIGATING CIRCUMSTANCES. - Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extremeduress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

## STATEMENT OF THE CASE

Petitioner was convicted of first-degree murder in the Circuit Court of the Eleventh Judicial Circuit of Florida on September 18, 1980, and was sentenced to death on September 23, 1980. A timely appeal was taken to the Supreme Court of Florida, which affirmed the judgment and sentence on December 22, 1982. Jackson v. State, 366 So. 2d 752 (Fla. 1978), cert. denied, 444 U.S. 885 (1979).

As reflected in the decision of the Supreme Court of Florida, Appendix A, the charges against the petitioner arose from the murder perpetrated by petitioner of his housekeeper by gunshot to the back of the head allegedly because the victim would not lend the petitioner an automobile. Supreme Court of Florida, No. 60, 021 atl.



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## REASONS FOR GRANTING THE WRIT

### I

THE SPECULATION IN WHICH THE SUPREME COURT OF FLORIDA ENGAGED IN UPHOLDING THE DEATH SENTENCE DESPITE THE ERRONEOUS RELIANCE BY THE SENTENCING COURT ON A NON-APPLICABLE AGGRAVATING FACTOR IS DIRECTLY CONTRARY TO DECISIONS OF THE FIFTH AND ELEVENTH CIRCUITS AND RAISES SERIOUS AND CONTINUING CONSTITUTIONAL QUESTIONS REGARDING THE PROPER SCOPE OF STATE APPELLATE REVIEW IN CAPITAL CASES. THE TRIAL COURT, OVER OBJECTION OF DEFENSE COUNSEL DID CONSIDER APPLICABLE AGGRAVATING CIRCUMSTANCE (h) THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

In its decision of December 22, 1982, the Florida Supreme Court agrees with petitioner's argument that the evidence did not support the contention that the murder was especially heinous, atrocious or cruel. Middleton v. State of Florida, Supreme Court of Florida No. 60,021, at 4. Having determined that the trial court impropery considered this aggravating circumstance, the Florida Supreme Court affirmed the convictions and sentence of death. Ibid, at 8.

The central theme of this Court's capital sentencing decisions has been the minimization of the risk of arbitrariness in the death sentencing determination. See, e.g., Eddings v. Oklahoma, _____U.S._____, 102 S.Ct. 869 (1982); Godfrey v. Georgia, 446 U.S. 420 (1980); Lockett v. Ohio, 438 U.S. 586 (1978); Gardner v. Florida, 430 U.S. 349 (1977); Proffitt v. Florida, 428 U.S. 242 (1976). In approving Florida's death peanlty scheme, this Court emphasized that the state supreme court, by virtue of its statewide jurisdiction and its commitment to proportionality review of every death sentence, could effectively avert any real risk of arbitrariness. Proffitt v. Florida, 428 U.S. 242, 259-60 (1976). The role of the state supreme court was acclaimed as ensuring "consistency, fairness and rationality in the evenhanded operation of the State law." Ibid.

The Supreme Court of Florida, in its review of petitioner's death sentence, has departed from this essential role. The Court has upheld petitioner's death sentence despite the sentencing court's consideration of a non-applicable aggravating factor. Section 921.141(5), Florida Statutes (1973);

Elledge v. State, 346 So.2d 998 (Fla. 1977). The Supreme Court of Florida did recognize that the sentencing court's reliance upon a non-applicable aggravating factor was error by upholding the sentence or death after ruling the trial court erred in considering an aggravating circumstance (h) The Florida Supreme Court engaged in the speculation that the trial court would have upheld the death sentence even without considering aggravating circumstance (h).

Such speculation on the part of an appellate court calls into question the entire state system of control on arbitrariness which appellate scrutiny is said to foster. See Zant v. Stephans, cert. granted, _____U.S._____, 102 So. Ct. 90 (1981), certified to Georgia Supreme Court, _____U.S._____, 102 So.Ct. 1856 (1982). Moreover, the conjecture in which the Supreme Court of Florida engaged in William Middleton's case is in direct contravention of the decisions of the United States Court of Appeals for the Fifth and Eleventh Circuits holding that the consideration of non-statutory aggravating factors invalidates a Florida death sentence, even absent findings of mitigating factors. Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982).

Ultimately, the speculative review by the Supreme Court of Florida has eviscerated the state's own limitation on arbitrariness and caprice. Rather than appellate review ensuring consistency and rationality in the death-sentencing process, the "review" in this case has injected the risk of arbitrariness.

## CONCLUSION

Based upon the foregoing, petitioner requests this Court to issue its Writ of Certiorari to review the decision of the Supreme Court of Florida in this cause.

Respectfully submitted,

GELBER, GLASS, DURANT & CANAL, P.A.
1250 N.W. 7th Street
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Miami, Florida 33125

By N. Joseph Durant
N. JOSEPH DURANT, ESQUIRE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-6663



WILLIAM MIDDLETON, JR.,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

---

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

---

I, WILLIAM MIDDLETON, JR., being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made below relating to my ability to pay the costs of prosecuting the cause are true.

I am not presently employed and have not been employed for three years preceding the execution of this affidavit.

I have not, within the past twelve months, received any income from a business, profession or other form of self-employment, or in the form of rent payments, interest dividends, or other sources. I do not own any cash or checking or savings account.

I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

William Middleton Jr.
WILLIAM MIDDLETON, JR.

GELBER GLASS DURANT CANAL & DARBY, P.A. • ATTORNEYS AT LAW • SUITES 203-205 • 1250 NORTHWEST 7th STREET • MIAMI, FLORIDA 33125 • (305) 326-0090

SWORN TO AND SUBSCRIBED before me this 6 day of May, 1983.

NOTARY PUBLIC, State of Florida
-at Large-

My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Oct. 4, 1986

# Supreme Court of Florida

No. 60,021

WILLIAM MIDDLETON, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[December 22, 1982]

PER CURIAM.

This case is on appeal from a circuit court judgment. Appellant was convicted of first-degree murder, grand theft, and unlawful use of a firearm in the commission of a felony. The circuit court sentenced appellant to death for the crime of first-degree murder. We have jurisdiction of the appeal. Art. V, § 3(b)(1), Fla. Const.

On February 16, 1980, a citizen called the police and reported that her friend Gladys Johnson had not been seen for two days, that her car was missing and her house was completely closed and locked. Police officers broke into the house and found the body of Gladys Johnson. She had been shot in the back of the head with a shotgun. The murder weapon was found in the house.

On February 17, appellant William Middleton was arrested in New York City on suspicion of "jostling," that is, being a pickpocket. The main evidence of appellant's guilt was a confession he made in New York to an assistant district attorney of that state. The attorney who conducted the interview and the

stenographer who wrote down appellant's statement testified at the trial.

Gladys Johnson was the mother of a man whom appellant had met in prison. When appellant was released on parole on December 28, 1979, he went to live with Gladys Johnson in the Miami area. Mrs. Johnson offered appellant a home because he had nowhere else to go. On February 14, 1980, they had an argument because Mrs. Johnson would not allow appellant to use her car. That evening, when she went to sleep on the living room sofa, he took her shotgun and sat with it across his lap for about an hour, contemplating killing her. When she awoke, he shot her in the back of the head. He locked the house and left in her car. That night, he drove to Tampa. The next day he returned to Miami, left the car at a bus station, and boarded a bus for New York City, taking Mrs. Johnson's two pistols with him. He sold the guns in New York.

The manager of the Greyhound Bus station in North Miami Beach testified that he reported the presence of a car that apparently had been abandoned on his lot. This car was identified as belonging to Gladys Johnson. The keys to the locks on the front door of her house were found in the car.

Appellant contends that there was insufficient proof of premeditation to support the verdict of guilty of first-degree murder. This argument is based on part of appellant's confession in which he said that the shooting was a "snap decision." The confession also said, however, that appellant sat for an hour thinking about killing Mrs. Johnson. In either event, that the decision was made at all is sufficient to prove premeditation. Proof of the element of premeditation does not require that thought or reflection of any specific minimum duration be shown. Songer v. State, 322 So.2d 481 (Fla. 1975), vacated on other grounds, 430 U.S. 952 (1977).

Appellant contends that there was insufficient evidence to support the verdict on the grand theft charge. The charge was based on appellant's taking of the victim's car and two pistols.

It was proven by competent, substantial evidence.

Appellant's main point on appeal concerns his confession and the manner in which it was introduced at trial.[1] Appellant argues that the trial court erred in allowing the stenographer from New York to read the confession into the record. Appellant argues that because he never saw, signed, or acknowledged the transcription of his statement, it was not properly authenticated. He cites Marshall v. State, 339 So.2d 723 (Fla. 1st DCA 1976), cert. dismissed, 354 So.2d 982 (Fla. 1977), and Williams v. State, 185 So.2d 718 (Fla. 3d DCA 1966), for the proposition that a transcription of a defendant's oral statements is not admissible in evidence as a written confession unless it is signed or otherwise acknowledged by the defendant. See Annot., 23 A.L.R.2d 919 (1952). Appellant argues that this rule should apply to the reading of a transcription of a defendant's oral statements since this Court said in Haines v. State, 156 Fla. 9, 27 So.2d 414 (1946), that reading a defendant's statement to the jury is equivalent to introducing the written document into evidence.

The state responds by arguing that the stenographer was allowed to read his notes to refresh his memory. Although we do not agree that the evidentiary doctrine pertaining to refreshing the memory justifies what was done at trial, we find that the

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1. There was a pre-trial hearing on the admissibility of appellant's confession. Two officers of the New York City Transit Police testified concerning appellant's arrest and initial questioning. One of the officers said that when appellant was arrested, he spontaneously began to deny knowledge of the murder of a woman in Florida. The other officer said that appellant's companion, who was arrested at the same time, mentioned the possibility of appellant being wanted for a crime in Florida. Both officers testified that appellant was warned of his rights, did not ask that questioning cease, and did not ask to see an attorney. The statement testified to at trial was not made to the officers, but was made later that day in response to questioning by the assistant district attorney, who testified at trial. Appellant testified at trial that when he was arrested the officers told him he was wanted on suspicion of murder in Florida and that he falsely confessed because he was led to believe this was the only way he would avoid the death penalty. On this appeal, however, appellant does not contend that his confession was coerced or that the interrogation violated his constitutional rights.

doctrine of "past recollection recorded" does. There is a difference:

> There is a clear and obvious distinction between the use of a memorandum for the purpose of stimulating the memory and its use as a basis for testimony regarding transactions as to which there is no independent recollection. In the former case it is immaterial what constitutes the spur to memory, as the testimony, when given, rests solely upon the independent recollection of the witness. In the latter case the memorandum furnishes no mental stimulus, and the testimony of a witness by reference thereto derives whatever force it possesses from the fact that the memorandum is the record of a past recollection, reduced to writing while there was an existing independent recollection. It is for that reason that a memorandum, to be available in such cases, must have been made at or about the time of the happening of the transaction, so that it may safely be assumed that the recollection was then sufficiently fresh to correctly express it.

Volusia County Bank v. Bigelow, 65 Fla. 638, 646, 33 So. 704, 706 (1903); See also Great Atlantic & Pacific Tea Co. v. Hobles, 202 So.2d 603 (Fla. 1st DCA 1967), cert. denied, 210 So.2d 725 (Fla. 1968); King v. Califano, 183 So.2d 719 (Fla. 1st DCA 1966). We conclude that the stenographer's testimony was proper not based on the theory of refreshed memory, but rather on the theory that his transcription was a recording of the statement he heard. Section 90.803(5), Florida Statutes (1979), provides:

> The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:
>
> . . .
>
> (5) RECORDED RECOLLECTION.--A memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. A party may read into evidence a memorandum or record when it is admitted, but no such memorandum or record is admissible as an exhibit unless offered by an adverse party.

The stenographer testified that he had no independent recollection of appellant's confession, but that he had personally recorded the statement verbatim and had accurately transcribed his notes into the written statement which he then

read to the jury. We hold that the stenographer's testimony was admissible as a "past recollection recorded."[2]

Appellant argues that the stenographer should not have been allowed to testify because he was not able to identify appellant as the person whose statement he recorded. However, the New York County assistant district attorney who testified at trial identified appellant, testified that he confessed to her, and provided the link between appellant and the stenographer's written transcript. It was this attorney who conducted the interview, and she identified appellant as the person whose confession was recorded by the stenographer. The attorney's testimony by itself was sufficient evidence to prove the confession; the stenographer's reading of the transcript merely provided the details with its verbatim account.

Next appellant argues that it was error for the trial court, over his objection, to instruct the jury on the doctrine of felony murder. Appellant says that since there was no evidence to support such a charge, the instruction should not have been given. The indictment in this case charged that appellant committed first-degree murder by shooting the victim either from a premeditated design to effect her death or while in the perpetration of robbery. It has long been held that a first-degree murder indictment alleging premeditation is sufficient even though the state proceeds on alternative theories

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2. Other jurisdictions are in accord. See, e.g., Jordan v. People, 151 Colo. 133, 376 P.2d 699 (1962), cert. denied, 373 U.S. 944 (1963); State v. Rosa, 170 Conn. 417, 365 A.2d 1135, cert. denied, 429 U.S. 845 (1976); Hall v. State, 223 Md. 156, 162 A.2d 751 (1960); State v. Bindhammer, 44 N.J. 372, 209 A.2d 124 (1965); Lay v. State, 461 P.2d 1021 (Okla Crim. App. 1969). Still other jurisdictions have reached the same result, without referring to the doctrine as "past recollection recorded," by holding that a written statement of a defendant's oral confession is admissible if a person who was present at the confession can verify its accuracy. See Ellenburg v. State, 353 So.2d 810 (Ala. Crim. App. 1977); People v. Thompson, 133 Cal. App. 2d 4, 284 P.2d 39 (Dist. Ct. App. 1955); Freeman v. State, 230 Ga. 85, 195 S.E.2d 416 (1973); People v. Perkins, 17 Ill.2d 493, 162 N.E.2d 365 (1959); State v. Dierlamm, 189 La. 344, 180 So. 135 (1938); Craft v. State, 380 So.2d 251 (Miss. 1980); State v. Fox, 277 N.C. 1, 175 S.E.2d 561 (1970); 2 M. Underhill, Criminal Evidence, § 404 (5th ed. Interim Supp. 1979); 3 C. Torcia, Wharton's Criminal Evidence, § 444 (13th ed. 1973).

and the proof at trial supports conviction on the felony murder theory. Knight v. State, 338 So.2d 201 (Fla. 1976). It is also proper to allege the alternative methods of committing the crime where the state anticipates that there will be some evidence of felony murder. Here there was evidence that appellant took the victim's car keys and pistols and drove away in her car after shooting her. Since there was some evidence of robbery to support the alternative allegation of a killing in the perpetration of robbery, it was proper for the trial court to instruct the jury on felony murder.

We come now to the question of the sentence of death. Appellant challenges the constitutionality of the capital felony sentencing law on the grounds that the aggravating circumstances are vague and overbroad, that there is no compelling state interest in imposing capital punishment, that the law precludes consideration of mitigating factors, and that it has been arbitrarily and capriciously applied. These arguments have previously been disposed of by the decisions in Proffitt v. Florida, 428 U.S. 242 (1976); Fleming v. State, 374 So.2d 954 (Fla. 1979); Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979); and State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

The trial court found that appellant had previously been convicted of a felony involving the use or threat of violence, that at the time of the murder he was under a sentence of imprisonment, that the murder was committed for pecuniary gain, that it was especially heinous, atrocious, or cruel, and that it was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Appellant challenges the latter three of the above-listed aggravating circumstances.

The finding that the murder was committed for pecuniary gain was supported by the fact that appellant stole the victim's car and pistols. That there was some evidence of anger on appellant's part toward the victim did not preclude the finding of a pecuniary motive.

Appellant argues that the finding that the murder was especially heinous, atrocious, or cruel is not supported by the evidence. We agree. Although the deliberate murder of Mrs. Johnson was unquestionably atrocious as that word is understood in common parlance, the words of this aggravating circumstance have become legal words of art. The killing itself was not "accompanied by such additional acts as to set the crime apart from the norm" of deliberate killings. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). The evidence shows that the victim instantly died from a shotgun blast to the back of her head from close range. She had just awakened from a nap, was facing away from appellant, and had no awareness that she was going to be shot. See Maggard v. State, 399 So.2d 973 (Fla.), cert. denied, 102 S.Ct. 610 (1981).

The trial court was correct, however, in finding that the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Appellant's confession said that he sat with the shotgun in his hands for an hour, looking at the victim as she slept and thinking about killing her. This is clearly the kind of intentional killing this aggravating circumstance was intended to apply to. The cold-blooded calculation of the murder went beyond mere premeditation. See Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 102 S.Ct. 2254 (1982). The shocking thing about this murder is that the only thing the victim ever did to the appellant, so far as the record indicates, was to show him extraordinary kindness and generosity.

Appellant contends that the trial court erred in finding no mitigating circumstances. Specifically he argues that the judge should have found and considered the fact that appellant was operating under the influence of extreme emotional disturbance. He says that he was under great stress as the aftermath of his prison experience, that the tension built up, and that he lost his temper and directed his anger towards the

victim. The evidence to support this position is not clear enough to enable us to hold that the trial judge erred in declining to find the existence of such mitigating factors. In addition, the jury's recommendation of a sentence of death is a strong indication that it did not find appellant's emotional state particularly compelling as a mitigating circumstance.

Even though we have disapproved one of the aggravating circumstances found by the trial court, there remain several other aggravating circumstances supported by evidence--appellant had previously been convicted of a violent felony, was on parole from a prison sentence, had a pecuniary motive, and murdered the victim in a cold, calculated, and premeditated manner. The jury recommended death and the judge found no mitigating circumstances. With the case in this posture, we conclude that the trial court's sentence is appropriate.

The convictions and the sentence of death are affirmed.

It is so ordered.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON and McDONALD, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Dade County,
David L. Levy, Judge - Case No. 80-3299

John A. Lapinski, Miami, Florida,
for Appellant

Jim Smith, Attorney General and Steven R. Jacob, Miami, Florida,
for Appellee

Lapinski
3411 NW 46 River Dr
33125

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-6663



WILLIAM MIDDLETON, JR

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

---

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

---

The petitioner, WILLIAM MIDDLETON, JR., by and through undersigned counsel, moves this Court for leave to proceed in forma pauperis in the above-styled cause, pursuant to Rule 46.1 of this Court. Petitioner has been adjudicated indigent and permitted to proceed in forma pauperis by the courts of the State of Florida. The affidavit of the petitioner in support of this motion has been mailed to petitioner and will be forwarded.

Respectfully submitted,

GELBER, GLASS, DURANT &
CANAL P.A.
1250 N.W. 7th Street
Suites 203-205
Miami, Florida 33125
Phone: 326-0090

BY: N. Joseph Durant
N. JOSEPH DURANT, ESQUIRE

82-6663



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

---

William Middleton, Jr.

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

---

# RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

---

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ATTORNEY GENERAL

MICHAEL J. NEIMAND
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Counsel for Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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WILLIAM MIDDLETON, JR.

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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## PRELIMINARY STATEMENT

Respondent accepts that portion of the Petition for Writ of Certiorari setting forth the Citation To Opinion Below, Jurisdiction, Constitutional and Statutory Provisions Involved found on pages 1 through 3 of Petition. However, the list of aggravating circumstances is incomplete and the following is a complete listing of the same.

> (5) Aggravating circumstances.--
> Aggravating circumstances shall be limited to the following:
> (a) The capital felony was committed by a person under sentence of imprisonment.
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the persons.
> (c) The defendant knowingly created a great risk of death to many persons.
> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

## QUESTION PRESENTED

Whether the Floirda Supreme Court's practice of upholding a death sentence, where on review one of the Statutory aggravating circumstances is found inapplicable and, where there is still at least one statutory applicable aggravating circumstance and no mitigating circumstances, is violative of Eighth Amendment's Requirement of Rational Appellate Review of Capital Sentencing Decisions.

## STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case as a substantially accurate account of the proceedings below.

## HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The question before the Supreme Court of Florida was whether the trial court erred in imposing the death penalty, alleging that the trial court improperly found five aggravating factors.

The Supreme Court of Florida, found that only one of the five aggravating circumstances was not supported by the evidence. After finding that the other four aggravating factors were supported by the evidence, the Court upheld the death sentence.

## REASONS FOR NOT GRANTING THE WRIT

Petitioner contends that the Florida Supreme Court, in upholding the death sentence, after one of the statutory aggravating circumstance is found inapplicable on review, where there is still at least one statutory applicable aggravating circumstance and no mitigating circumstances, statutory or otherwise, engages in speculation that the trial court would have upheld the death sentence without considering the invalid aggravating circumstance. This alleged practice, the Petitioner contends, infuses into the Florida's system, the risk of arbitrary imposition of the death sentence and review. In support thereof, Petitioner relies on Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980) modified, 648 F.2d (5th Cir. 1981) cert. granting, Zant v. Stephens, 102 S.Ct. 90 (1981), certified to Georgia Supreme Court, 102 S.Ct. 1865 (1982).

The Petitioner also contends that the aforestated practice is a direct contravention of the decisions of the United States Court of Appeals for the Fifth and Eleventh Circuits holding that the consideration of non-statutory aggravating factors invalidates a Florida Death Sentence, even absent findings of mitigating factors. Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982).

Respondent submits that Petitioner's claim are without merit. The aforestated practice does not inject arbitrariness into the process in as much as the Florida Supreme Court's decision, after invalidating a statutory aggravating circumstance is based on the same evidence that the trial judge and jury would use on remand.

Stephens v. Zant, supra is inapposite. In Stephens, the jury's imposition of the death penalty was held incapable of review when it was determined by the appellate court that one of the statutory aggravating circumstances considered by the jury was unconstitutional. The sentence was incapable of review because the jury, in arriving at its sentence, did not make any specific finding as to which of the aggravating circumstances it found persuasive--there was no clue as to the jury's reasoning simply because there was no record of it. Henry v. Wainwright, supra, involved a situation where the jury's instructions allowed consideration of nonstatutory aggravating circumstances, and there was an improper jury instruction. The jury sentence in Henry like that in Stephens, was held incapable of review due to an inability to determine what weight the jury had given to the improperly considered factors. This in turn was due to the absence of a record of the jury's reasoning process. Neither Stephens v. Zant, nor Henry v. Wainwright control.

On May 3, 1982, this Court in Zant v. Stephens directed the Georgia Supreme Court to provide the United States Supreme Court with the premise of state law that supports the state court's conclusion that the death sentence was not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury. This Court in Zant v. Stephens held that with regard to Georgia statute:

> Despite the clarity of the state rule we are asked to review, there is considerable uncertainty about the state-law premises of that rule. The Georgia Supreme Court has never explained the rationale for its position. . . .

102 S.Ct. at 1858.

In Florida no such problem exists. First, the trial court, not the jury imposes the death penalty. The trial court is required to make findings of fact both as to the aggravating and mitigating circumstances in support of said

findings. The Florida Supreme Court in reviewing the trial court's findings in imposing death must review said findings for procedural regularity and determine whether the evidence before the trial court supports the aggravating and mitigating circumstances found. In so doing the Florida Supreme Court in reviewing said findings by the trial court substantiates from the record the validity of each of the aggravating and/or mitigating findings made. Secondly, the Florida Supreme Court in addressing this issue in Elledge v. State, 346 So.2d 998, 1002-1003, "explained the rationale for its position." 102 S.Ct. 1858. The Florida Supreme Court in Elledge observed:

> It appears that the United States Supreme Court does not fault a death sentence predicated in part upon non-statutory aggravating factors where there are no mitigating circumstances. The absence of mitigating circumstances becomes important, because so long as there are some statutory aggravating circumstances, there is no danger that non-statutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute. [Citation omitted.] State v. Dixon, 283 So.2d 1 (Fla. 1973) teaches that:
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> > ". . . [T]he procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. . . ." 283 So.2d at 10.
>
> If this be so, then regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.

246 So.2d at 1002, 1003.

In Brown v. State, 381 So.2d 690 (Fla. 1980), the Florida Supreme Court in amplifying its rationale on this point observed:

> Although improper aggravating circumstances (factors enumerated 1 and 2) went into the calculus of the trial judge's sentence decision and there was identified a mitigating circumstance (appellant's age). Nevertheless, Elledge v. State, 346 So.2d 998 (Fla. 1977) does not compel a reversal of the sentence judgment in this case. This is so because unlike Elledge, here "we can know" that the result of the weighing process would not have been different had the impermissible factors not been present. 346 So.2d at 1003. The trial judge has told us in his order that the appellant's age 22 years at the time of the offense and 23 years at the time of the trial, had only "some minor significance." When this tenuous factor is juxtaposed against at least two well-founded aggravating circumstances it is beyond reason to conclude that the trial judge's decision to impose the death penalty would have been affected by the elimination of the unauthorized aggravating circumstances. This case then is dissimilar to Elledge, but like Hargrave v. State, 366 So.2d 1 (Fla. 1978), where the doubling up of aggravating circumstances was not fatal to the imposition of a death sentence even in light of the existence of two mitigating circumstances. Here, as there, ample other statutory aggravating circumstances exist to convince us that the weighing process has not been compromised. Given the imprecision of the criteria set forth in our capital punishment statute we must test for reasoned judgment in the sentencing process rather than a mechanical tabulation to arrive at a net sum. Hargrave v. State, supra; State v. Dixon 283 So.2d 1 (Fla. 1973).

381 So.2d at 696.

Henry v. Wainwright is distinguishable and not applicable to the instant case in that the Fifth Circuit Court of Appeals concluded that the jury was erroneously instructed that there was no limitation as to the aggravating circumstances that may be utilized. Because said instruction was utilized, the Fifth Circuit Court of Appeals required reversal.

Proffitt v. Wainwright, is also distinguishable and not applicable to the instant case in that said case also dealt with the trial judge's reliance on nonstatutory aggravating circumstances.

In the case sub judice, the trial court found five aggravating circumstances and no mitigating ones. (App. 1-10).

The Florida Supreme Court, after invalidating one of the aggravating circumstance, upheld the death sentence:

> Even though we have disapproved one of the aggravating circumstances found by the trial court, there remain several other aggravating circumstances supported by the guidance -- Appellant had previously been convicted of a violent felony, was on parole from a prison sentence. Had a pecuniary motive, and murdered the victim in a cold calculated and premediated manner. The jury recommended death and the judge found no mitigating circumstances. With the case in this posture, we conclude that the trial court's sentence is appropriate. (App. 12-13).

In Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), the Court was presented with the exact issue presently before this Court. After reviewing Stephens v. Zant, supra, the Court found that this Court's ruling in Stephens given no direct support to Defendant's position. The Court further states:

> Indeed, Stephens leaves open the possibility that when there are proper state law premises, a death sentence may be sustained so long as at least one of a plurality of statutory aggravating circumstances is valid and supported by the evidence.

685 F.2d at 814.

The Court then held that the Florida Supreme Court's decision in upholding the Defendant's sentence of death was not constitutional error requiring resentencing inasmuch as the remaining valid statutory aggravating circumstances were supported by the evidence and no mitigating factors were present.

In the case sub judice, the remaining valid statutory aggravating circumstances were supported by the evidence, reviewed by the Supreme Court. Further, there were no mitigating factors present and no nonstatutory aggravating circumstances used by the trial court to impose the death sentence. Therefore, the Florida Supreme Court's decision to uphold the

death sentence did not inject arbitrariness into the sentencing process.

## CONCLUSION

Therefore Respondent would urge, based on the foregoing, that this Court should not grant further review to petitioners.

Respectfully submitted:

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ATTORNEY GENERAL

By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response To Petition For Writ Of Certiorari To The Supreme Court Of Florida was furnished by mail to N. Joseph Durant, Esq., Counsel for Petitioner, 1250 N.W. 7th Street, Suites 203-205, Miami, Florida on this 1 day of June, 1983.

MICHAEL J. NEIMAND
Assistant Attorney General

Of Counsel

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM MIDDLETON, JR. VS. THE STATE OF FLORIDA

Case No.

# A P P E N D I C E S

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

STATE OF FLORIDA, :

Plaintiff :

vs. :

WILLIAM MIDDLETON, JR. :

Defendant. :

CRIMINAL DIVISION (LEVY)

CASE NO. 80-3289

SENTENCE



THIS CAUSE came before the Court for trial by jury and, after deliberations, a verdict was rendered by the jury finding the defendant guilty of murder in the first degree, grand theft, and the unlawful possession of a firearm during the commission of a criminal offense.

Thereafter, a separate sentencing proceeding was conducted before the trial jury to determine whether the said jury would recommend that the defendant be sentenced to death or life imprisonment as authorized by Florida Statute 775.082. The jury duly deliberated and returned its advisory sentence. A majority of the said jury recommended that this Court impose the sentence of death upon the defendant, WILLIAM MIDDLETON, JR.

Pursuant to Florida Statute 921.141(3), this Court is required to, and does, consider each of the mitigating and aggravating circumstances involved herein, and makes the following findings:

AGGRAVATION

(a) Whether the defendant was under sentence of imprisonment when the defendant committed the murder of which the defendant has been convicted.

FINDING:

The defendant, William Middleton, Jr., was under a sentence of imprisonment when he committed the murder of which he has been convicted. The evidence introduced by the State of

Florida during the penalty phase of these proceedings have conclusively established that the defendant was adjudicated guilty of the crime of robbery in 1974 and was sentenced to serve seven (7) years in the State Prison System in connection with that conviction. The evidence further established that the State Department of Corrections received the defendant, pursuant to the commitment issued in connection with the said conviction, on January 7, 1975. Thereafter, on December 28, 1979, the defendant was paroled. The first degree murder of which the defendant has been convicted herein was committed on February 14, 1980, slightly less than sixty (60) days after he was paroled. However, this Court finds, as an absolute matter of fact and law, that as far as this aggravating circumstance is concerned, the defendant was still "under a sentence of imprisonment". In making this finding, the Court notes particularly that the aggravating circumstance makes no mention of the requirement that the defendant be confined or housed in a penal institution in order to constitute this aggravating circumstance. Rather, the statute only requires that the defendant be under a sentence of imprisonment. Certainly being on parole, which requires that the defendant remain under the strict supervision of the State of Florida's Department of Corrections, is as much a form of legal imprisonment, since he is under their supervision by virtue of the prison sentence imposed in 1974. By virtue of the parole, the executive branch of the State of Florida merely determined that the defendant would continue to serve his sentence outside of a penal institution, but still under the supervision of the Department of Corrections which also has the responsibility of supervising and maintaining prisoners who are housed in penal institutions.

Clearly the evidence establishes, and the Court hereby finds, that the sentence of imprisonment imposed upon this defendant in 1974 had not expired, either legally or factually. The foregoing clearly establishes that this aggravating circumstance exists and is present in this case. Furthermore, the evidence clearly established that subsequent to the said robbery conviction, the defendant was

convicted of the felony of aggravated assault and was also sentenced with regard to that felony conviction. That sentence (in connection with the aggravated assault conviction) had not yet expired either at that time that the defendant committed the first degree murder of which he has been convicted in this case.

(b) Whether the defendant has previously been convicted of another capital felony or of a felony involving the use or threat of violence to the person.

FINDING:

The evidence clearly establishes that, prior to the commission of the first degree murder of which the defendant has been convicted in this case, the defendant has previously been convicted of two (2) separate felonies, each involving the use or threat of violence to the person. Specifically, the Court makes reference to and hereby adopts as part of this paragraph the two (2) felony convictions referred to in aggravating circumstance paragraph "(a)" immediately above.

(c) Whether, in committing the murder of which the defendant has been convicted, the defendant knowingly created a great risk of death to many persons.

FINDING:

There is no evidence in the record to indicate that this aggravating circumstance applies. Therefore, the Court finds that it does not apply in this case.

(d) Whether the murder was committed while the defendant was engaged in the commission of, or an attempt to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb, or was an accomplice to that crime.

FINDING:

The Court finds that there is insufficient evidence to establish the existence of this aggravating circumstance. While the Court notes that there is evidence in the record which might circumstantially imply that the defendant committed the murder

herein in connection with a robbery, the Court further notes that the jury instructions read to the jurors prior to the penalty phase of the trial requires them to be convinced beyond and to the exclusion of reasonable doubt as to the existence of any aggravating circumstances. The Court specifically finds that the evidence is insufficient to establish beyond and to the exclusion of a reasonable doubt that the murder committed by William Middleton, Jr., herein, was done in connection with a robbery. Therefore, the Court finds that this aggravating circumstance does not apply to this case.

(e) Whether the murder of which the defendant was convicted was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

FINDING:

There is no evidence that the defendant committed the murder for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) Whether the murder of which the defendant has been convicted was committed for pecuniary gain.

FINDING:

The evidence establishes that, as part of the commission of the murder and the defendant's flight from this jurisdiction thereafter, the defendant took the victim's two (2) pistols and subsequently sold them for a total of between eighty ($80) and ninety ($90) Dollars, the said proceeds kept by the defendant. The Court finds that this aggravating circumstance has been established.

(g) Whether the murder of which the defendant has been convicted was committed to disrupt or hinder the lawful excercise of any governmental function or the enforcement of laws.

FINDING:

There is no evidence that the murder was committed to disrupt or hinder the lawful excercise of any governmental function or enforcement of laws.

(h) Whether the murder of which the defendant was convicted was especially heinous, atrocious or cruel.

FINDING:

The Court finds that the capital felony committed in this case was especially heinous, atrocious, and cruel. The Supreme Court of Florida, in consideration of the legalities of the death sentence in the State of Florida, decreed that these terms were to receive their common connotations and decreed that "heinous" meant "extremely wicked or shockingly evil", "atrocious" meant "outrageously wicked and vile", and "cruel" meant "a design to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others". See Dixon v. State, 283 So. 2d 1, Page 9, Florida Supreme Court, 1973. The facts of this case indicate the full meaning of "heinous, atrocious and cruel". The facts of this case establish that the defendant observed the victim to be sleeping on a couch. The defendant picked up the 12-gauge shotgun that was used as the murder weapon and sat in a chair where he could view the sleeping victim. The evidence further clearly establishes that the defendant sat there, with the shotgun laying across his lap, for approximately one (1) hour, clearly having decided that he was going to kill the victim. Having made that decision, the defendant spent the better part of the said hour watching the victim sleep. Although the defendant's decision to kill the victim was made long before the victim ever began to wake up, the defendant did not kill the victim while she was still asleep, and thereby completely unaware (as far as all of her physical senses were concerned) of the terrible physical trauma that the defendant was about to do to her. The evidence clearly establishes that the defendant did not fire the shotgun at the back of her head, thereby creating a hole in the back of her head approximately nine (9) inches across (according to the testimony of the Deputy Dade County Medical Examiner) until the victim had awakened and began to stir. By waiting until the victim had begun

to stir, the defendant was virtually assured that the victim would be aware, through one or more of her physical senses, of the terrible physical trauma that was about to be inflicted upon her body. As incredible as it may seem, the Deputy Medical Examiner's testimony clearly established that the victim would have physically been able to choke and gag on her own blood for up to five (5) minutes after having been shot. Furthermore, the defendant's own statement clearly established that as he was preparing to depart the victim's house, shortly after having fired the fatal shot into the back of the victim's head, he (the defendant) personally observed that the victim was still breathing and that the lower portion of the victim's body was shaking. One need not be a doctor to imagine the possible physical sensations being sensed by the victim during these last terrible and horrifying moments before her death actually took place. Certainly, the evidence clearly establishes that the defendant's actions were "pitiless" as defined within the jury instructions given to the jury in connection with the penalty phase of this case.

(i) Whether the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

FINDING:

The Court specifically finds that this aggravating circumstance is present in this case. As part of this finding, the Court hereby adopts as part of its findings in this paragraph all of the findings and evidence made and referred to in the aggravating paragraph "(h)" dealing with the heinous, atrocious and cruel nature of the capital felony as described in the aggravating circumstance paragraph immediately above. Furthermore, the Court specifically finds that the defendant's crime was committed in a manner that was so cold, calculated, and premeditated that it far surpasses, legally and factually, that degree of evidence which would otherwise only be necessary to establish the "premeditated design" element of first degree murder.

MITIGATION

(a) Whether the defendant has no significant history or prior criminal activity.

FINDING:

This mitigating circumstance does not apply to this defendant. The defendant has two prior felony convictions, both of which involve the threat or use of violence against other persons. The Court is specifically referring to, and hereby adopts as part of its findings in this paragraph those findings and comments made by the Court in the aggravating circumstance portion of this order relating to the previous felony convictions that the defendant received for the felony of robbery and the felony of aggravated assault.

(b) Whether the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

FINDING:

There is no evidence that William Middleton, Jr. was under the influence of extreme mental or emotional disturbance during the commission of the murder. In fact, the evidence clearly establishes the contrary, particularly as evidenced by the defendant's thorough and detailed statement given to law enforcement officers. From the Court's personal observation of the defendant throughout the period of time that this trial has lasted, the Court makes the specific and definite finding of fact that the defendant was able to answer the charges facing him and able to adequately, properly, and fully assist counsel in his defense at the trial. The Court observed the defendant conferring constantly with his attorney throughout the trial. In addition, the Court observed the defendant to be paying particular attention to all of the testimony of all the witnesses throughout the trial.

(c) Whether the victim was a participant in the defendant's conduct or consented to the act.

FINDING:

The victim at no time and in no way consented to nor

participated in the conduct of the defendant's acts.

(d) Whether the defendant was an accomplice in the murder committed by another person, and the defendant's participation was relatively minor.

FINDING:

The Court specifically finds that this mitigating circumstance does not apply in this case. The Court further finds that the defendant was the only person involved in perpetrating this crime and there were no accomplices.

(e) Whether the defendant acted under extreme duress or under the substantial domination of another person.

FINDING:

There is absolutely no evidence or indication that the defendant's actions were a result of his being under any form of duress or substantial domination of another person.

(f) Whether the capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired.

FINDING:

There is no evidence that this defendant's capacity to appreciate the criminality of the murder that he committed was diminished or impaired in any way. In fact, to the contrary, the evidence conclusively establishes that the defendant was proceeding methodically upon a course of conduct to kill the victim herein and thereafter perpetrated the crime that he planned to commit, and remained committed to committing, for approximately one (1) hour.

(g) The age of the defendant at the time of the crime.

FINDING:

William Middleton, Jr., was well into his majority at the time that he committed the first degree murder for which he now stands convicted. Specifically, the defendant was Twenty-four (24) years old when he committed this murder.

This Court has used as a basis for consideration in imposing sentence no information whatsoever not known to the defendant and/or his counsel of record. Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L.Ed. 2d 393 (1977).

Upon the preceding specific findings of fact the Court bases its sentence. It being the opinion of this Court that there are sufficient aggravating circumstances to justify the sentence of death, and this Court, after weighing and considering the aggravating and mitigating circumstances, being of the opinion that no mitigating circumstances, either statutory, or by any testimony, facts or circumstances presented at the advisory proceeding, or during the trial-in-chief, exist to outweigh the aggravating circumstances, I therefore agree and concur with the advisory sentence and recommendation rendered to this Court by the trial jury.

It is, therefore, the sentence of this Court that, as to Count 1 of the Indictment, you, WILLIAM MIDDLETON, JR., be adjudicated guilty of murder in the first degree and that you be, and hereby are, sentenced to death for the murder of GLADYS JOHNSON.

It is further ordered that you, WILLIAM MIDDLETON, JR., be taken by the proper authority to Florida State Prison and there be kept in close confinement until the date of your execution be set.

It is further ordered that on such scheduled date that you be put to death by having electrical current pass through your body in such amounts and frequency until you are rendered dead. You, WILLIAM MIDDLETON, JR., are hereby notified that the judgment of conviction and the sentence of death are subject to automatic review by the Supreme Court of Florida.

As to County II of the Indictment, grand theft, it is the judgment and sentence of this Court that you be adjudicated guilty and sentenced to a term of five (5) years in the State prison, the said sentence to be served consecutive to the sentence

heretofore imposed in Count I.

As to Count III of the Indictment, the unlawful possession of a firearm during the commission of a criminal offense, it is the judgment and sentence of this Court that you be adjudicated guilty of the said offense, with the Court hereby suspending entry of any sentence for that offense, as it is required to do under the case law of the State of Florida.

You are further advised that as to the judgments and sentences imposed in Count I, Count II, and Count III of the Indictment herein, you have the right to appeal within thirty (30) days from the date of these proceedings. You are further advised that you have the right to the assistance of counsel in the filing and preparation of your appeal and upon your request and a showing that you are entitled to an attorney at the expense of the State, an attorney will be appointed to represent you.

DONE AND ORDERED this 23rd day of September, 1980 in Open Court, at Miami, Dade County, Florida.

DAVID L. LEVY
CIRCUIT JUDGE